IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No. 36 of 1991

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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DASHRATHBHAI JETHABHAI & 4 - Appellant(s)
Versus
PATEL HIRABEN MADHAVLAL & 6 - Defendant(s)

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Appearance :
MR MEHUL S SHAH for Appellant(s) : 1.2.1, 1.2.2, 1.2.3,1.2.4 - 5.
None for Defendant(s) : 1, 1.2.1, 1.2.2, 1.2.3, 1.2.4,1.2.5 - 7.

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CORAM : HONOURABLE MR.JUSTICE R.S.GARG

Date : 24/01/2007

ORAL JUDGMENT

1. Heard Shri Mehul S.Shah, learned counsel for the appellants. None for the respondents though the name of Mr.K.G. Raval, learned counsel appears for the respondents.

2. Present is an appeal by the unsuccessful plaintiffs who have lost before both the courts.

3. The case of the plaintiffs is that they are owner of Survey No.475 and were on an earlier occasion drawing water from the well situate at the corner of Survey No.477/2 and were carrying water from that well to their own Survey No.475 through Survey No.476 which belonged to the defendants. Their submission is that since after the well situated at the corner of Survey No.477/2 had dried up, they have to fetch water from a well which situate at the corner of Survey No.422/1. According to them, a straight stream of water would flow from the corner of Survey No.422/1 to another corner of Survey No.477/2 and from there following the existing channel it would reach to the Survey No.475, he prayed for an injunction restraining the defendants from interfering with their rights.

4. The defendants appeared before the court and submitted that since after the old well dried up, the plaintiffs would have no right to carry water from new well and pass it through the old channel situate on the land of the defendants and carry the same to the plaintiffs' land.

5. With the permission of the Court, each of the party

obtained Commissioner's report. The Commissioner Report showed that in between Survey Nos.474 and 476, there were marks of water channel. The court also held that the plaintiffs were carrying water from old well through a channel situate in between Survey Nos.474 and 476. It, however, held that carrying water from the new well situate on Survey No.422/1, additional burden would be created on the defendants' property, therefore, such permission now cannot be accorded in favour of the plaintiffs nor a new right can be created in favour of the plaintiffs.

6. The appeal has been admitted for hearing the parties on the following substantial question of law;

> (i) Does the right of taking water for irrigation of field stand extinguished permanently simply because one well gets dried up and use is made of another well without imposing any further burden on the servient owner?

7. Mr.Shah, learned counsel for the appellants submits that by action of the plaintiff, no additional burden is cast upon the plaintiffs' land bearing Survey Nos.474 and 476. He submits that whether water is carried from the

old well or from the new well to Survey Nos.474 and 476 and thereafter, it is carried to plaintiffs' land bearing Survey No.475, the action is not going to create any additional burden upon the defendants' land. He submits that the courts below did not properly appreciate the dispute and went wrong in dismissing the suit.

8. Sec.23 of the Indian Easement Act, 1882 relates to right to alter mode of enjoyment, it reads as under;

Sec.23.Right to alter mode of enjoyment.- Subject to the provisions of section 22, the dominant owner may, from time to time, alter the mode and place of enjoying the easement, provided that he does not thereby impose any additional burden on the servient heritage.

Explanation:- the dominant owner of a right of way cannot vary his line of passage at pleasure, even though he does not thereby impose any additional burden on the servient heritage.

ILLUSTRATIONS

(a) A, the owner of a saw-mill, has a right to a flow of water sufficient to work the mill. He may convert the saw-mill into a corn-mill; provided that it can be worked by the same amount of water.

(b) A has a right to discharge on B's land the rain-water from the eaves of A' house. This does not entitle A to advance his eaves if, by so doing he imposes a greater burden on B's land.

(c) A as the owner of a paper-mill, acquires a right to pollute a stream by procuring in the refuse-liquor produced by making in the mill paper from rags. He may pollute the stream by pouring in similar liquor produced by making in the mill paper by a new process from bamboos, provided that he does not substantially increase the amount, or injuriously change the nature, of the pollution.

(d)A, a riparian owner, acquires as against the owner riparian owners, a prescriptive right to pollute a stream by throwing sawdust into it. This does not entitle A to pollute the stream by discharging into it poisonous liquor.

9. From Sec.23, it would be clear that subject to provisions of sec.22, the dominant owner may, from time to time, alter the mode and place of enjoying the easement provided that he does not thereby impose any additional burden on the servient heritage.

10. The question in the present case would be that if the plaintiffs could carry water from the old well and are now proposing to carry water from the new well from the very same channel, then whether they would be creating any additional burden on the servient heritage.

11. Sec.22 of the Act says that the dominant owner must exercise his right in the mode which is least onerous to the servient owner, and, when the exercise of an easement can without detriment to the dominant owner be confined to a determinate part of the servient heritage, such exercise shall at the request of the servient owner, be so confined.

12. In the present case, the question that whether the plaintiffs were creating any additional burden on the servient heritage, has at all not been considered by the two courts. The two courts have confined themselves to sec.15 of the Act, less appreciating that it only gives a right to a person / dominant heritage to claim easementary rights over the servient heritage, while sec.23 allows the dominant heritage to alter mode of enjoyment.

13. In the present matter, the simple dispute was that whether by carrying water from the new well situate at

the corner of Survey No.422/1, would the plaintiff be creating any additional burden on the servient heritage. In absence of decision on such question, the suit of the plaintiffs could not be dismissed. Instead of entering into the question for the first time, as it would require consideration of the facts, I set aside the judgment and decree passed by the two courts and remand the matter to the trial court for deciding the issue afresh in accordance with the observations made by this Court.

14. The impugned judgment and decree passed by the two courts below are hereby set aside. The appellants who are present before this Court, shall appear before the trial court on 19/2/2007 with a copy of this Judgment and Order. After receiving copy of the order, the trial court shall issue notice upon the present respondents /defendants and after serving notices upon them, shall proceed to decide the matter afresh. The appeal is allowed. No costs. Let a decree be framed accordingly.

(R.S. GARG, J.)

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